

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

TRANSFERRING FIRST-CLASS MAIL PARCELS)
TO THE COMPETITIVE PRODUCT LIST) Docket No. MC2015-7

**MOTION OF GAMEFLY, INC.
FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS
(January 28, 2015)**

GameFly, Inc., respectfully requests leave to file the Supplemental Comments that it has separately submitted to the Commission today. Although the procedural schedule in this docket contemplated only two rounds of comments, good cause exists for allowing supplemental comments now.

First, several major developments have occurred since the December 17 deadline for mailer comments. In its December 29, 2014 CRA report, the Postal Service acknowledged that its prices for First-Class Mail Parcels covered 108.86 percent of the costs attributable to the product in Fiscal Year 2014—*i.e.*, that the prices were compensatory.¹ In its January 15 notice of price changes in Docket No. R2015-4, the Postal Service announced that it plans to impose price increases averaging 10.18 percent in its already-compensatory prices of First-Class Mail Parcels—*five times* the average increase of 1.966 percent proposed for market dominant mail as a whole, and five times the increase in the CPI since the last CPI-based price adjustment—even if the current

¹ USPS Cost and Revenue Analysis Report for FY 2014 (public version), “Cost 1” worksheet, cell R18 (filed December 29, 2014 in Docket No. ACR2014).

product transfer request is denied.² Finally, in its January 26 notice of price changes in Docket No. CP2015-33, the Postal Service announced that it will seek even steeper price increases on First-Class Mail parcels if the Commission agrees to reclassify the product as competitive: “Prices for First-Class Mail Retail parcels will be increased 22 percent if the transfer is approved.”³ Moreover, the biggest percentage increases will be in the lightest weight cells, where competition from private carriers is weakest.⁴

Price Increases on Single-Piece First-Class Parcels Proposed By USPS In CP2015-33			
Maximum Weight (Ounces)	Existing Price (\$)	Price Proposed in CP2015-33 (\$)	Increase
1	2.32	2.94	26.7%
2	2.32	2.94	26.7%
3	2.32	2.94	26.7%
4	2.50	3.12	24.8%
5	2.68	3.30	23.1%
6	2.86	3.48	21.7%
7	3.04	3.66	20.4%
8	3.22	3.84	19.3%
9	3.40	4.02	18.2%
10	3.58	4.20	17.3%
11	3.76	4.38	16.5%
12	3.94	4.56	15.7%
13	4.12	4.74	15.0%

² Docket No. R2015-4, *Notice of Market-Dominant Price Adjustment*, USPS Notice (Jan. 15, 2015) at 20.

³ Docket No. CP2015-33, USPS Notice of Changes in Rates of General Applicability for Competitive Products Established in Governors’ Decision No. 14-5 (January 26, 2015), Governors’ Decision No. 14-05 at 2-3.

⁴ *Id.*

Nothing in the Postal Service's notice in CP2015-33 suggests that these price increases are meant to be temporary or designed to reduce the Postal Service's total contribution. The Postal Service's ability to profit from imposing a small but significant nontransitory increase in price ("SSNIP") is the Commission's ultimate test for market dominance under 39 U.S.C. § 3642(b)(2). Docket No. MC2013-57, *Competitive Product List—Adding Round-Trip Mailer* (Dec. 23, 2014) at 14-15, 18, 49, 51. Hence, the Postal Service's recent actions to impose substantial price increases on First-Class Mail Parcels should be reflected in the record.

Second, the Postal Service has seriously misstated the governing law. In its January 7 reply comments, the Postal Service argued for the first time in this case that the appropriate standards for assessing market dominance are defined not by the DOJ/FTC Merger Guidelines or Docket No. MC2013-57, but a 2008 Department of Justice policy statement entitled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*. USPS Reply Comments at nn. 17, 18, 20, 21, 23, 27, 32, 34 and 35 (citing 2008 policy statement). The Postal Service failed to mention, however, the Department of Justice's disclaimer when promulgating the 2008 policy statement that it was intended only for use in monopolization cases, and was not intended to replace the SSNIP test in merger cases and other cases where the threatened anticompetitive conduct was merely potential. Moreover, the Postal Service also failed to acknowledge that the Department of Justice rescinded the 2008 policy statement in 2009, on the ground that standards proposed in the policy statement failed to provide adequate protection against abuse of market power. Department of Justice News Release, *Justice Department Withdraws Report on Antitrust Monopoly Law* (May 11, 2009) (http://www.justice.gov/atr/public/press_releases/2009/245710.htm).

On January 27, 2015, the Postal Service partially corrected the record by filing a notice in this docket acknowledging that the 2008 policy statement had been rescinded. The Postal Service, however, did not accurately explain why the Department of Justice took this action. Nor did the Postal Service acknowledge the limited scope of the policy statement from its outset, or the reason for that limitation. Fairness to other parties, and the Commission's institutional interest in a complete record, warrant allowing GameFly to correct the record.

Finally, the Postal Service's reply comments have advanced a number of other arguments, and cited a number of purported authorities, that are matters of first impression for the Commission in Section 3642 product transfer cases. The Postal Service's discussion of these items is also inaccurate and incomplete. The Commission would benefit from having a more complete and balanced record on these matters.

Respectfully submitted,

David M. Levy
Matthew D. Field
VENABLE LLP
575 Seventh Street, N.W.
Washington DC 20004
(202) 344-4732

Counsel for GameFly, Inc.

January 28, 2015